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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 19/2014*, **

Communication submitted by:	Fiona Given (represented by counsel, Phillip French, the Australian Centre for Disability Law)
Alleged victim:	The author
State party:	Australia
Date of communication:	27 November 2013 (initial submission)
Document references:	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 10 February 2014 (not issued in document form)
Date of adoption of Views:	16 February 2018
Subject matter:	Right to vote by secret ballot
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims
Substantive issues:	General obligations under the Convention; equality and non-discrimination; accessibility and participation in political and public life
Articles of the Convention:	4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3), 9 and 29 (a) (i), (ii) and (iii)
Articles of the Optional Protocol:	2 (d) and (e)

* Adopted by the Committee at its nineteenth session (14 February–9 March 2018).

** The following members of the Committee participated in the examination of the communication: Ahmad Al-Saif, Danlami Umaru Basharu, Munthian Buntan, Imed Eddine Chaker, Theresia Degener, Samuel Njuguna Kabue, Hyung Shik Kim, Stig Langvad, Robert George Martin, Martin Babu Mwesigwa, Coomaravel Pyaneandee, Valery Nikitich Rukhledev and Damjan Tatic.

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1. The author of the communication is Fiona Given, a national of Australia born in 1978. She claims to be a victim of violations by the State party of article 29 (a) (i), (ii) and (iii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9 of the Convention. The Optional Protocol to the Convention entered into force for the State party on 19 September 2009. The author is represented by counsel, Phillip French.

A. Summary of the information and arguments submitted by the parties

The facts as submitted by the author

2.1 The author has cerebral palsy and, as a result, she has limited muscle control and dexterity and no speech. She uses an electric wheelchair for mobility and an electronic synthetic speech generating device for communication.

2.2 On 7 September 2013, federal elections were held in the states and territories for the House of Representatives and for the Senate. Under the Commonwealth Electoral Act 1918, the Australian Electoral Commission (the Electoral Commission) is the authority responsible for conducting elections and referendums in the State party. The Electoral Commission conducted the 2013 federal election by means of postal voting, polling stations and electronically assisted voting for persons with visual impairments, in line with the Electoral Act.

2.3 At the time of the elections, the author wanted to vote by secret ballot on an equal basis with other electors. However, due to her limited dexterity, she is unable to mark a ballot paper and fold and deposit it in a ballot box without live assistance, which would compromise the secrecy of her vote. She argues that, in order to be able to cast an independent and secret ballot, she requires access to an electronic voting system, such as a computer-generated interface. She notes that she routinely utilizes adaptive technology that enables her to use a computer keyboard and screen independently of any other person. Prior to polling day, the author read the Electoral Commission literature on voting options. She determined that, pursuant to the Electoral Act, electronically assisted voting would only be made available to persons with visual impairments registered as such.

2.4 On 7 September 2013, the author attended the Electoral Commission polling station in the North Sydney electoral division. She was accompanied by her attendant. In the absence of an electronic voting facility, she opted to exercise her right as a person with physical disabilities, under article 234 of the Electoral Act, to request the assistance of the polling booth's presiding officer in marking the ballot papers according to her instructions, folding them and depositing them in the ballot box. However, the presiding officer refused the author's request for assistance on the grounds that she was "too busy" and directed the author to obtain assistance from her attendant. The author attempted to respond, through her electronic communication device, that she did not wish to disclose her voting intention to her attendant, as the attendant is a person with whom the author is obliged to have a close, continuing relationship. The presiding officer insisted that the author obtain the aid of her attendant to vote, which she eventually unwillingly did. In the absence of access to an electronic voting system, the author would have preferred the assistance of an electoral officer who was a stranger to her, but this would still have been objectionable as this option would not have enabled her to cast a secret ballot.

2.5 The author argues that she does not have access to an effective domestic remedy in order to address the violations of her rights by the State party. The Disability Discrimination Act of 1992 and the Anti-Discrimination Act of 1977 of the State of New South Wales prohibit discrimination on the basis of disability in specified areas of public life, subject to certain exceptions. However, the author argues that she would have had no prospect of success had she challenged the fact that she did not have access to an electronic voting platform under these acts, as the Electoral Act clearly stipulates that the Electoral Commission can only make electronic voting available to persons with visual impairments. She further argues that there would have been no prospect of success for any claim alleging discrimination based on disability under the Disability Discrimination Act or the Anti-Discrimination Act in relation to the presiding officer's refusal to provide assistance to her, as section 234 of the Electoral Act provides that the presiding officer should provide

assistance if the eligible voter "fails" to nominate another person and not merely upon request from the eligible voter.

The complaint

3.1 The author claims that her rights under article 29 (a) (i), (ii) and (iii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9 of the Convention have been violated, as the State party did not ensure that she, as a person with disabilities, could effectively and fully participate in political and public life on an equal basis with others. Specifically, the author claims that the State party violated her rights, as it denied her the rights to accessible voting procedures and facilities, to vote by secret ballot utilizing assistive technology and to obtain voting assistance from a person of her choice.

3.2 She further argues that the rights recognized in article 29 of the Convention are derived, inter alia, from article 25 of the International Covenant on Civil and Political Rights, and that they were immediately realizable at and from the entry into force of the Convention in the State party.

State party's observations on admissibility and the merits

4.1 The State party submitted its observations on the admissibility and the merits of the communication on 17 December 2014. The State party submits that, save for the author's claim under article 29 (a) (ii), the complaint should be declared inadmissible for failure to exhaust domestic remedies under article 2 (d) of the Optional Protocol or for failure to sufficiently substantiate the claims under article 2 (e) of the Optional Protocol. Should the Committee find the author's claims admissible, the State party submits that the claims are without merit and that the author's rights under the Convention have been respected.

4.2 The State party accepts that the author is a person with disabilities under the Convention and that she is subject to the State party's jurisdiction. It also accepts that the conduct complained of by the author occurred after the Optional Protocol entered into force in the State party.

4.3 The State party notes that the requirement to exhaust all available domestic remedies means that an author must make use of all judicial or administrative avenues that offer him or her reasonable prospect of redress.[1] It notes that, according to the author, the only national laws available to address her allegations of discrimination are the Disability Discrimination Act 1992 and the Anti-Discrimination Act 1977, but that she would have had no prospect of success had she submitted her claims under these laws in the State party. The State party argues that the author has not identified how the alleged breach could have been remedied, and submits that, following the close of polling, no remedy could fully rectify the alleged breach, even a remedy from the Committee, as the time for the author's vote had passed. The State party refers to the jurisprudence of the Human Rights Committee and notes that the Committee has expressed the view that it is incumbent upon the author of a communication to pursue available remedies, while noting that mere doubts about the effectiveness of such remedies do not absolve an author from pursuing them. The State party further notes that the author has not suggested that she lacks the financial means to pursue domestic remedies. It notes, however, that, even if this were the case, the lack of financial means does not absolve an author of the requirement to exhaust all available domestic remedies under article 2 (d) of the Optional Protocol.[2]

4.4 The State party does not challenge the author's argument that she was not able to directly challenge the provisions of the Electoral Act under the Disability Discrimination Act, or any other piece of legislation, with regard to her specific claim under article 29 (a) (i) that the State party failed to provide user-friendly and accessible voting facilities or to her claim under article 29 (a) (ii), and that the State must protect the rights of those with disabilities to vote by secret ballot. The State party, however, submits that the author has

[1] See CCPR/C/52/D/437/1990, para. 5.2.

[2] See CCPR/C/45/D/397/1990, para. 5.4.

failed to exhaust domestic remedies in respect of her claims under article 29 (a) (iii) of the Convention.

4.5 Regarding the author's complaint concerning the conduct of the presiding officer under article 29 (a) (iii) of the Convention, the State party argues that the author should have submitted a complaint to the national jurisdictions under the Administrative Decisions (Judicial Review) Act 1977. This Commonwealth Act codifies Australian common law and allows those aggrieved by an administrative decision to apply to the Federal Circuit Court of Australia or the Federal Court of Australia for an order of review, on one of the grounds set out in section 5 of the Act. The relevant court could then, under section 16 (1) (c) of the Act, issue an order declaring the rights of the parties in respect to the relevant matter. The State party further notes that section 234 of the Electoral Act provides that, where the presiding officer is satisfied that a voter is "so physically incapacitated" that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to assist him or her in casting his or her vote. Further, where such a voter fails to appoint a person to assist in casting his or her vote, the presiding officer has a duty to assist that person.

4.6 The State party submits that the author's version of events regarding the conduct of the presiding officer on polling day has not been substantiated. It argues that, should the author's version of events be accurate, then the presiding officer may have failed to perform her duty under section 234 of the Electoral Act. It notes that the presiding officer was obliged, by law, if satisfied of a voter's physical disability, to either permit a person appointed by the author to assist her to vote, or assist the author with casting the vote herself. The State party argues that, under section 234, voters are under no obligation to nominate a person to assist them. Where they do not do so, the presiding officer must assist. The State party submits that, based on the facts as described by the author, the presiding officer was obliged to assist the author to vote. The State party submits that the author failed to exhaust domestic remedies in this regard by not applying to the Federal Circuit Court or the Federal Court of Australia for an order of review of the conduct of the presiding officer.

4.7 The State party further argues that effective non-legal remedies were also available to the author in relation to the alleged breach under article 29 (a) (iii) of the Convention that should have been utilized prior to lodging a communication with the Committee, namely, to make a complaint to either: (a) the Electoral Commission, about the conduct of the presiding officer; (b) the divisional returning officer; or (c) the officer in charge of the polling place. The State party notes that it is compulsory for both the divisional returning officer and the officer in charge to record any issues which may arise on polling day, such as complaints made to them. It further notes that the Electoral Commission contacted the divisional returning officer, the officer in charge and the second officer in charge, who were present at the author's polling place on 7 September 2013, and that none of these three persons recall the author seeking assistance on polling day. The State party argues that, if the author had made a complaint on polling day, through the use of assistive technology or through her attendant, it might have been possible to provide an effective remedy to her complaint under article 29 (a) (iii) of the Convention. Additionally, the State party submits that the author could also have made a complaint of disability-based discrimination to the Australian Human Rights Commission. The Commission has the power to investigate complaints of discrimination under various acts, including the Disability Discrimination Act, and to attempt conciliation where possible. If the Commission is unable to conciliate the complaint, it may terminate it. In such cases, the complainant may then bring legal proceedings before the Federal Circuit Court or the Federal Court. The federal courts are able to make a variety of orders, including an order for an apology to be issued and an order declaring that the respondent has engaged in unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination. The State party therefore submits that, with regard to her complaint under article 29 (a) (iii), the author has failed to exhaust both the legal and non-legal remedies available to her, and that her claim is therefore inadmissible.

4.8 The State party further notes that article 2 (e) of the Optional Protocol requires the Committee to find inadmissible those claims that are manifestly ill-founded or not

sufficiently substantiated. In this connection, it refers to the jurisprudence of the Human Rights Committee, according to which a claim is not merely an allegation, but an allegation supported by substantiating material, and an author must submit sufficient evidence in substantiation of his or her allegations in order to establish a prima facie case.[3] The State party submits that, save for the author's claims under article 29 (a) (ii) of the Convention, all her other claims are insufficiently substantiated under article 2 (e) of the Optional Protocol and should be declared inadmissible. Specifically, the State party submits that the author has not provided: (a) any evidence or substantiation of her claims under article 5, as she has not explained why her treatment constituted discrimination; (b) any evidence or substantiation of her claims under article 9, except for referring to the lack of an electronic voting option for persons with her disability; (c) any evidence or substantiation of her claim under article 29 (a) (i); (d) any evidence to substantiate her version of events on 7 September 2013, which relate to the allegation of a breach of article 29 (a) (iii); and (e) any evidence or substantiation of her claims under article 4.

4.9 In its observations on the merits of the communication, the State party notes that the Electoral Act provides for polling to be conducted by postal vote, at polling places and by way of electronically assisted voting for persons with visual impairments. Voting is compulsory and, by convention, all Australian citizens are entitled to and are provided with a secret ballot. As concerns the author's claims under article 29 (a) (i) of the Convention, persons with disabilities have access to a range of accessible and appropriate voting options under the Electoral Act.[4] The Electoral Commission Disability Inclusion Strategy for 2012–2020 includes targeted outcomes that are aimed at maximizing access to voter services and polling places. To this end, the Commission runs a polling place inspection programme. At the 2013 federal election, there were 7,697 polling places, of which 11.8 per cent were fully accessible to persons with disabilities and 70.2 per cent had assisted access. The Commission ensures that the advertising and information distributed and available prior to every election clearly show the location of polling places with either full or partial access for persons with disabilities. Under the Strategy, one of the targeted outcomes is also to improve web accessibility and online information services. The Commission's website contains enrolment and voting information, available in large print, e-text and easy English formats, and an Australian-standard sign language video with plain English voice-over and captions. Select publications are available on request in other accessible formats, such as Braille and audio. Furthermore, candidate lists, election publications and the official guide to the election are available in accessible formats. The State party submits that the author was therefore provided with appropriate and easy-to-understand information about how, where and when to vote, and that she had the option of voting in a number of different ways, including at fully accessible polling places. The State party argues that, although the author was not able to vote in her preferred way, this situation does not constitute a breach of the State party's obligations under article 29 (a) (i) of the Convention.

4.10 As concerns the author's claim under article 29 (a) (ii) of the Convention, the State party submits that the most important aspect of article 29 (a) (ii) is the obligation to protect the right of persons with disabilities to vote by secret ballot. The State party notes that the Electoral Act makes it an offence for any person, and specifically scrutineers or Electoral Commission staff, to interfere with a person when they are placing their vote. The penalty for this offence is six months' imprisonment. The State party submits that a ballot can still be secret for the purposes of the Convention even if an elector is assisted to vote by another person. Voters must, however, be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted. The State party argues that the jurisprudence of the Human Rights Committee implicitly supports this view, noting that the Committee has stated that assistance provided to persons with disabilities, blind persons

[3] See A/64/40 (Vol. I), para. 118.

[4] The State party notes that the Electoral Act provides for, inter alia, the following measures: the option for persons with disabilities to vote outside, in close proximity to, a polling place, where the voter is not physically capable of entering the polling place; the option of voting via a postal vote, prior to election day; the option of a pre-poll vote, which allows persons who are not able to vote on the day of the election to attend a specified pre-polling station in the weeks prior to an election; and special voting options for persons with visual impairments.

and persons who are illiterate should be independent.[5] The State party therefore argues that, when a person is assisted to vote by a person of their choice, or by someone else who can be considered to be independent, that vote is still secret, as it is protected from disclosure to the relevant state authorities or those holding political power. The State party notes that, pursuant to section 234 of the Electoral Act, voters who cannot vote without assistance are able to have a person of their choice or the presiding officer of the polling station assist them in doing so. The State party argues that presiding officers are independent for the purposes of the Convention, as the Electoral Act establishes the Commission as an independent statutory agency administered by an independent Commissioner.

4.11 As to the question of technology, the State party argues that the obligation under article 29 (a) (ii) of the Convention does not require States parties to the Convention to provide assistive and new technologies to each and every voter who cannot vote without assistance. The State party submits that, from a practical point of view, this would not be possible, as persons with disabilities have a multitude of different needs. It submits that the requirement to facilitate the use of assistive technology is a general or aspirational obligation required of States parties, which need only to be met where appropriate. The State party submits that the current scheme under the Electoral Act provides sufficient provision for voters with complex needs, including those with disabilities, to vote in an accessible way, while protecting their right to a secret ballot. The State party additionally submits that it falls within its broad discretion to decide how to allocate limited resources, and that it is justifiable that, at this stage, only voters with visual impairments are provided with the option of using assistive technologies when voting. The State party also submits that it continues to proactively explore the possible use of new technologies for persons with disabilities and that it is committed to the development and promotion of the use of such technologies in consultation with persons with disabilities.

4.12 As concerns the author's claims under article 29 (a) (iii) of the Convention, the State party refers to its arguments as concerns the admissibility of this claim and submits that there is an adequate legislative scheme in place to ensure that voters are able to nominate a person of their choice to assist them to vote.

4.13 Regarding the author's claim under article 4 of the Convention, the State party submits that, should the Committee find these claims to be admissible, they are without merit. With regard to the author's claims under article 5 (2) of the Convention, the State party argues that it has prohibited both direct and indirect discrimination on the basis of disability in the Disability Discrimination Act, and that a range of legal and non-legal measures are in place in the State party to prohibit and prevent discrimination on protected grounds. The State party further argues that the author has not explained, beyond referring to her lack of a secret voting option, what aspect of the conduct of the 2013 federal election amounted to discrimination. Regarding the author's claim under article 5 (3) of the Convention, the State party notes that sections 5 (2) (a) and 6 (2) (b) of the Disability Discrimination Act specifically provide that failure to make reasonable adjustments for persons with disabilities will result in unlawful discrimination. The State party argues that it has introduced specific reasonable adjustments and accommodations to ensure that persons with disabilities can participate in the electoral system on an equal basis with others. The State party further submits that the author's claim that she should be able to have access to assistive voting technology does not represent a reasonable accommodation, but would amount to an absolute obligation to provide assistive technology to all those who cannot vote unassisted.

4.14 As concerns the author's claim under article 9 that the State party failed to take appropriate measures to ensure that persons with disabilities have access to information and communications technology and live assistance, the State party submits that it falls within its broad discretion to decide how to allocate its limited resources and that it is justifiable that, at this stage, it has not promoted the use and development of information and communications technology in relation to voting and elections, for all persons with disabilities similar to those of the author. It also argues that live assistance of the kind envisaged under article 9 (2) (e) was specifically provided for by section 234 of the

[5] See general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 20.

Electoral Act. The State party argues that, as the author did not lodge any complaint with the Commission or elsewhere, it is not possible to substantiate her claim that section 234 of the Electoral Act was not complied with. The State party submits that the author's claims under articles 5 (2) and (3) and 9 are therefore without merit.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 12 June 2015, the author submitted her comments on the State party's observations on the admissibility and the merits of the communication. She maintains that the communication is admissible. She notes that the State party has submitted that her claim as regards the conduct of the presiding officer is not sufficiently substantiated in her complaint. She maintains that she has sufficiently substantiated this claim and argues that the fact that she did not lodge a complaint with the Electoral Commission or any other body about her interaction with the presiding officer is not evidence that the event she complained of did not occur.

5.2 The author notes that the State party has not challenged her assertion that there was no domestic remedy available to her as concerns her claims under article 29 (a) (i) and (ii) of the Convention. She notes that these claims are central to her complaint. As concerns her claim under article 29 (a) (iii), she notes the argument of the State party that, following the close of polling, no remedy could fully rectify the alleged breach as the time for voting had passed. She argues that there was no possibility to rectify the alleged violation by making an application for judicial review of the presiding officer's conduct under the Administrative Decisions Act prior to the close of polling on 7 September 2013. She further maintains her interpretation of section 234 of the Electoral Act, namely that she was entitled to the assistance of the presiding officer only if she failed to appoint another person to assist her. She further argues that, even if she had obtained the assistance of the presiding officer, this would have potentially exposed her voting intention to multiple scrutineers and other persons, contrary to her desire and her right to cast a secret vote. As concerns the State party's argument that she could have made a complaint to the Human Rights Commission, the author argues that she had no reasonable prospect of success in making a claim of disability-based discrimination in relation to the conduct of the presiding officer before the Commission, as the presiding officer was acting in accordance with article 234 of the Electoral Act. She argues that the Commission has no power or function under the Disability Discrimination Act to address a complaint that does not disclose unlawful discrimination on the basis of disability, and that, in any event, the Commission is not a judicial body and consequently has no power to judicially review or to order remedies in relation to a complaint under the Disability Discrimination Act.[6]

5.3 In response to the State party's claim that she has failed to sufficiently substantiate her complaint, the author refers to the arguments that she submitted with her initial complaint that: (a) because of her disabilities, she was not provided with the opportunity to vote by secret ballot on an equal basis with others. The voting procedure adopted by the Electoral Commission meant that she was compelled to accept the assistance of another person and potentially to be observed casting her vote by multiple persons, in violation of her right to equality and non-discrimination; (b) under the domestic law of the State party, there is no legal protection available to her in relation to such discrimination; and (c) she would have been able to exercise her right to vote by secret ballot if the Electoral Commission had provided her with reasonable accommodation in the form of an electronic voting option. In relation to her complaint under article 9 of the Convention, the author argues that the State party has failed to observe its obligation under this provision with respect to the realization of her rights as recognized under article 29 of the Convention. She claims that the State party failed to provide her with an accessible electronic voting system or facility that would have enabled her to independently cast a secret ballot. She notes that she uses such a system to cast an independent vote by secret ballot in New South Wales State elections and that such a platform is readily available and in use within the jurisdiction, and that, under the terms of the Electoral Act, it could be used in federal elections and referendums. She further argues that the live assistance potentially available

[6] The author refers to CRPD/C/D/2/2010, para. 5.1.

to her compromises the secrecy of her vote, by exposing her voting intention to multiple persons. As concerns her claim under article 4, the author argues that the State party has not taken legislative measures to repeal or amend the Electoral Act to introduce an electronic voting system that would enable her to independently cast a vote by secret ballot. She considers that this amounts to disability-based discrimination in the conduct of the 2013 federal election.

5.4 As to the merits of the communication, the author argues that none of the measures outlined in the State party's observations regarding voting procedures and facilities provided for in the Electoral Act would enable her to cast an independent and secret vote. She reiterates that there is already a well-tested and well-functioning electronic voting system that has been in operation in the State of New South Wales since 2011 and that is readily available for use by the Electoral Commission. She notes that she has used this system, called "iVote", to cast an independent vote by secret ballot in the last two New South Wales State elections. She argues that the real barrier to the use of an electronic voting system is the State party's refusal to amend the Electoral Act to permit its generalized use.

5.5 The author notes the State party's argument that a ballot can still be secret for the purposes of the Convention even if an elector is assisted to vote by another person. She considers that a vote cannot be secret in circumstances where the voter's voting intention must be exposed to at least one other person and potentially multiple other persons. She argues that the Electoral Act imposes no obligation on a person providing assistance to another person to vote pursuant to section 234 of the Electoral Act, or scrutinizing that vote, to maintain the confidentiality of that vote.

5.6 The author further notes that, according to the State party, the requirement to facilitate the use of assistive technology is a general or aspirational obligation that needs to be fulfilled only where it is appropriate. The author argues that, in her case, an electronic voting option is a reasonable accommodation to enable her to cast a secret vote. She submits that it falls on the State party to demonstrate how the accommodation required is not reasonable in the sense that it would constitute a disproportionate or undue burden. She argues that the State party has failed to put any material before the Committee substantiating the claim that the use of an electronic voting option would constitute a disproportionate or undue burden, especially as such a voting option was provided to persons with visual impairments and as the "iVote" electronic voting option, as used in New South Wales State elections, could have been made available.

5.7 As a remedy, the author requests the Committee to make a finding of a violation of her rights under article 29 of the Convention, and to adopt recommendations so as to avoid any similar violations in the future.

State party's additional observations

6.1 On 19 August 2015, the State party submitted its observations on the author's comments. The State party reiterates its submission of 17 December 2014. It additionally argues that article 29 of the Convention contains obligations that are immediately realizable and others that are of a general nature, including the obligation to facilitate the use of assistive and new technologies, where appropriate.

6.2 The State party further argues that article 9 of the Convention contains certain obligations that are to be achieved gradually. It notes that the Committee has acknowledged that accessibility should be achieved through gradual implementation, when necessary.[7] It further notes that the Committee has noted that barriers to access to existing objects and services should be removed gradually in a systematic and continuously monitored manner, with the aim of achieving full accessibility.[8] As concerns the reasonable accommodation standard provided for in articles 2 and 5 (3) of the Convention, the State party refers to the

[7] The State party refers to general comment No. 2 (2014) on accessibility, para. 27.

[8] Ibid., para. 14.

travaux préparatoires to the Convention, noting in this regard that significant increase in cost can constitute a disproportionate burden.[9]

B. Committee's consideration of admissibility and the merits

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether it is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee nor has it been or is it being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's submission that the author's claims under article 29 (a) (iii) of the Convention relating to the alleged conduct of the presiding officer should be declared inadmissible under article 2 (d) of the Optional Protocol, as the author did not make an application to the Federal Circuit Court or the Federal Court of Australia for judicial review, and she did not submit a complaint in this regard to the Electoral Commission, the divisional returning officer, or the officer in charge of the polling place. The Committee further notes the author's argument that there was no possibility to rectify the alleged violation under article 29 (a) (iii) by making an application for judicial review prior to the close of polling on 7 September 2013. The Committee, however, notes that, under section 16 (1) (c) of the Administrative Decisions Act, the Federal Circuit Court and the Federal Court of Australia can make an order declaring the rights of the parties in respect of matters brought before the courts in applications for order of review. The Committee therefore finds that, by failing to make an application to the Federal Circuit Court or the Federal Court of Australia for judicial review of the alleged conduct of the presiding officer, the author failed to exhaust domestic remedies in this regard. The Committee therefore concludes that the author's claims under article 29 (a) (iii) of the Convention are inadmissible under article 2 (d) of the Optional Protocol.

7.4 The Committee also notes that the State party has not contested the author's argument that she was not able to directly challenge her claims under article 29 (a) (i) and (ii) of the Convention under domestic law. The Committee therefore considers that the requirements of article 2 (d) of the Optional Protocol have been met with regard to the author's claims under article 29 (a) (i) and (ii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9 of the Convention.

7.5 The Committee further notes the State party's submission that, save for the author's claims under article 29 (a) (ii) of the Convention, all her other claims should be found inadmissible under article 2 (e) of the Optional Protocol on the grounds of lack of substantiation. The Committee, however, notes the author's claim that, by failing to provide her with an accessible electronic voting system or facility that would have enabled her to cast an independent vote by secret ballot, the State party violated her rights as enshrined in the Convention, as she did not have the possibility to cast a secret vote on an equal basis with others. The Committee considers that, for the purposes of admissibility, the author has sufficiently substantiated her claims under article 29 (a) (i) and (ii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9 of the Convention.

7.6 There being no other obstacles to admissibility, the Committee declares the communication admissible as far as it concerns the author's claims under article 29 (a) (i) and (ii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and

[9] Ad hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, "The concept of reasonable accommodation in selected national disability legislation: background conference document prepared by the Department of Economic and Social Affairs", A/AC.265/2006/CRP.1.

(3) and 9 of the Convention. The Committee therefore proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of its rules of procedure.

8.2 As regards the author's claims under article 29 (a) (i) and (ii) of the Convention, the issue before the Committee is to assess whether the State party violated her rights by failing to provide her with accessible voting procedures and facilities, including through the use of assistive technology.

8.3 The Committee notes the author's argument that, in order to be able to cast an independent and secret vote, she requires access to an electronic voting system, such as a computer-generated interface. The Committee further notes the State party's submission that persons with disabilities have access to a range of accessible and appropriate voting options under the Electoral Act in the State party, and that the author had the option of voting in a number of different ways, including at fully accessible polling places. The Committee also notes the State party's argument that, when a person is assisted to vote by a person of his or her choice, or by someone else who can be considered independent, that vote is still secret, as it is protected from disclosure to the relevant State authorities or those holding political power. It also notes the author's submission that a vote cannot be secret in circumstances where the voter's voting intention must be exposed to at least one person, and, potentially, multiple other persons, as well as her argument that the Electoral Act imposes no obligation on a person providing assistance to a person to vote to maintain the confidentiality of that vote.

8.4 As concerns the issue of the use of assistive technology, the Committee notes the State party's argument that the obligation under article 29 (a) (ii) of the Convention does not require States parties to the Convention to provide assistive and new technologies to each and every voter who cannot vote without assistance. It further notes the State party's submission that the requirement to facilitate the use of assistive technology is a general or aspirational obligation required of States parties, which needs to be fulfilled only where it is appropriate, and that it is up to the State party to decide how to allocate limited resources. It also notes the State party's argument that barriers to accessing existing objects and services should be removed gradually, in a systematic and continuously monitored manner that is aimed at achieving full accessibility. The Committee further notes the author's submission that the State party has failed to put any material before the Committee substantiating the claim that the use of an electronic voting option would constitute a disproportionate or undue burden, especially given that such a voting option is provided to persons with visual impairments and the "iVote" electronic voting system, which has been used in New South Wales State elections since 2011, could have been made available.

8.5 The Committee recalls that article 29 of the Convention requires States parties to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote.[10] The Committee further recalls that, under article 29 of the Convention, the State party is required to adapt its voting procedures, by ensuring that they are appropriate, accessible and easy to understand and use. As concerns the accessibility of voting procedures, the Committee recalls that accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an ex ante duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service.[11]

8.6 The Committee further recalls that, in accordance with article 9 (1) of the Convention, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to information and communications,

[10] See CRPD/C/10/D/4/2011, para. 9.4.

[11] See general comment No. 2 (2014) on accessibility, para. 25.

including information and communications technologies and systems. The Committee also recalls that, under article 9 (2) (g), of the Convention, States parties should also take appropriate measures to promote access for persons with disabilities to new information and communications technologies and systems. The Committee further recalls that the importance of information and communications technology lies in their ability to open up a wide range of services, transform existing services and create greater demand for access to information and knowledge, particularly in underserved and excluded populations, such as persons with disabilities. In this regard, new technologies can be used to promote the full and equal participation of persons with disabilities in society, but only if they are designed and produced in a way that ensures their accessibility. New investments, research and production should contribute to eliminating inequality, not creating new barriers. The Committee further recalls that, under article 5 (2) of the Convention, States parties are under an obligation to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds,[12] and that denial of access to the physical environment, transportation, information and communication, or services open to the public should be clearly defined as a prohibited act of discrimination.[13]

8.7 In the present case, the Committee notes the argument of the State party that the author had the possibility to choose the support person of her choice to cast her vote. However, it also notes that none of the options available to the author in the 2013 federal election could have enabled her to exercise her right to vote in the way she wanted, namely without having to reveal her political choice to the person accompanying her. The Committee further notes that access to the use of an electronic voting system would have enabled the author to cast an independent and secret ballot without having to reveal her political choice to anyone, on equal basis with others.

8.8 As to the argument of the State party that barriers to accessing existing objects and services should be removed gradually, taking into account limited resources, and that significant increase in cost can constitute a disproportionate burden, the Committee recalls that the obligation to implement accessibility is unconditional. The entity obliged to provide accessibility may not therefore excuse the omission to do so by referring to the burden of providing access for persons with disabilities.[14]

8.9 In the present case, the Committee also recalls that the electronic voting option has been widely used for persons with visual impairments in New South Wales State elections since 2011. It also notes that the State party has not provided any information that could justify the claim that the use of such an electronic voting option would have constituted a disproportionate burden, so as to prevent its use in the 2013 federal election for the author and for all persons requiring such accommodation. The Committee also recalls that article 5 enshrines the principle of equal protection of all persons before and under the law. States parties must prohibit all disability-based discrimination and provide persons with disabilities effective and equal protection against discrimination on all grounds.[15] This conventional obligation implies that States parties must ensure the realization of the rights under the Convention for all persons with disabilities, and refrain from establishing discriminatory legislation and practice that can result in factors of discrimination depending on the type of impairment.

8.10 The Committee therefore finds that the failure to provide the author with access to an electronic voting platform already available in the State party, without providing her with an alternative that would have enabled her to cast her vote without having to reveal her voting intention to another person, resulted in a denial of her rights under article 29 (a) (i) and (ii), read alone and in conjunction with articles 5 (2), 4 (1) (a), (b), (d), (e) and (g) and 9 (1) and (2) (g) of the Convention.

[12] See Ibid., para. 5; see also CRPD/C/14/D/21/2014, para. 8.5.

[13] See general comment No. 2 (2014) on accessibility, para. 29.

[14] See Ibid., para. 25; and CRPD/C/14/D/21/2014, para. 8.4.

[15] See general comment No. 4 (2016) on the right to inclusive education, para. 45.

C. Conclusion and recommendations

9. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 29 (a) (i) and (ii), read alone and in conjunction with articles 5 (2), 4 (1) (a), (b), (d), (e) and (g) and 9 (1) and (2) (g) of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning the author, the State party is under an obligation to:

(i) Provide her with an effective remedy, including compensation for any legal costs incurred in filing the present communication;

(ii) Take adequate measures to ensure that the author has access to voting procedures and facilities that will enable her to vote by secret ballot without having to reveal her voting intention to any other person in all future elections and referendums in the State party;

(iii) Publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In that regard, the Committee requires the State party to:

(i) Consider amending the Electoral Act in order to ensure that electronic voting options are available and accessible to all people with disabilities who so require, whatever the types of impairment;

(ii) Uphold, and guarantee in practice, the right to vote for persons with disabilities, on an equal basis with others, as required by article 29 of the Convention, by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, and protect the right of persons with disabilities to vote by secret ballot through the use of assistive technologies;

(iii) Consider amending the Electoral Act in order to ensure that, in cases where assistance by another person may be necessary to enable a voter to cast his or her vote, the person providing such assistance is under an obligation to maintain the confidentiality of that vote.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee, within six months, a written response, including any information on action taken in the light of the present Views and recommendations of the Committee.